15-3424-cv

United States Court of Appeals

for the

Second Circuit

CECIL THOMAS, individually and on behalf of all others similarly situated,
JOHN DEAN, individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

(*Caption continued on the inside cover*)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

DEFENDANTS-APPELLEES' PETITION FOR REHEARING

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Plaintiffs,

– against –

TXX SERVICES, INC., PATRICIA DOUGAN HUNT,

Defendants-Appellees.

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Defendants-Appellees TXX Services, Inc. ("TXX") and Patricia Dougan Hunt respectfully submit this Petition for Rehearing. The Summary Order of October 25, 2016 (the "Order") vacated the District Court's grant of summary judgment to Defendants-Appellees and remanded the case for further proceedings.

BACKGROUND

Plaintiffs, a group of delivery drivers, established business entities that entered into independent contractor agreements with TXX to deliver its customers' freight to retailers. Despite this contractual arrangement, the individual drivers subsequently sued TXX under the Fair Labor Standards Act, 29 U.S.C. §§ 201, *et seq.* ("FLSA"), and New York State Labor Law, N.Y. LAB. LAW §§ 190, *et seq.* ("NYLL"), claiming that they are employees rather than independent contractors, and therefore are entitled to statutory protections, including overtime wages.

Defendants TXX and Patricia Dougan Hunt, one of TXX's officers, moved for judgment on the pleadings. The District Court converted the motion to one for summary judgment and invited Plaintiffs to identify additional discovery necessary to make a complete record. Plaintiffs sought and took three corporate representative depositions pursuant to Rule 30(b)(6). Despite having three months to prepare any supplemental submission in opposition to Defendants' motion for summary judgment, Plaintiffs did not supplement their submission of only five supporting declarations from their pool of seventy-three potential declarants.

Plaintiffs did not file an affidavit or declaration pursuant to Rule 56(d) seeking additional discovery prior to summary judgment, and they represented to the District Court that it had a "full and complete record." A782.

The motion was referred to Magistrate Judge Locke, who issued a thorough Report and Recommendation in which he held that the undisputed facts established that, in the totality of the circumstances, Plaintiffs were independent contractors. The District Court (Feuerstein, J.) accepted the recommendation and issued an order granting summary judgment in favor of Defendants and dismissing Plaintiffs' claims.

The Order vacated the District Court's judgment and remanded for further proceedings.

REASONS FOR REHEARING

Despite the factual nature of the "economic reality" test for determining whether an individual is an employee or an independent contractor under the FLSA – a test that looks to the totality of the circumstances, guided by the five factors set forth in *Brock v. Superior Care, Inc.*, 840 F.2d 1054 (2d Cir. 1988) – summary judgment can be entirely appropriate. As in any case, summary judgment is appropriate where, as here, "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." *Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9, 11 (2d Cir. 1986). The same is true for the analogous multi-factor test under the NYLL. "Properly used, summary judgment permits a court to streamline the process for terminating frivolous claims and to concentrate its resources on meritorious litigation." *Id.* at 12. This Circuit routinely affirms grants of summary judgment in FLSA and NYLL cases in similar circumstances. *See*, *e.g.*, *Meyer v. U.S. Tennis Ass'n*, 607 F. App'x 121, 123 (2d Cir. 2015) (summary order) (affirming holding that plaintiffs were independent contractors); *Brown v. N.Y.C. Dep't of Educ.*, 755 F.3d 154, 170-71 (2d Cir. 2014) (affirming holding that plaintiff was a volunteer); *Barfield v. N.Y.C. Health & Hosps. Corp.*, 537 F.3d 132, 144-49 (2d Cir. 2008) (affirming holding that defendant was joint employer).

The Order erred in reversing the District Court's order granting summary judgment in favor of defendants for four reasons. *First*, the District Court's findings as to both the underlying facts and the existence and degree of each of the *Brock* factors should have been reviewed under the "clear error" standard. The Order did not apply – and does not even mention – the correct standard. *Second*, the Order incorrectly concluded that the District Court resolved contested issues of fact. *Third*, the Order erred in finding that there were material issues of fact that precluded summary judgment. *Fourth*, the Order failed to address the lack of evidence relating to Defendant Patricia Dougan Hunt, and there was no basis for overturning summary judgment as to her.

Thirty years ago, this Court noted that "some litigants are reluctant to make full use of the summary judgment process," and the Court tried to dispel "their perception that this court is unsympathetic to such motions." *Knight*, 804 F.2d at 12. The Order represents an unfortunate step backward. *See also Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) ("Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'") (quoting Fed. R. Civ. P. 1).

I. The Order Did Not Appropriately Defer to the District Court's Findings as to the "Existence and Degree" of the *Brock* Factors.

Although the Order correctly noted that an award of summary judgment is reviewed *de novo*, Order at 5, in performing its *de novo* review, it should have accepted both the District Court's findings of historical facts and its findings as to the existence and degree of each of the *Brock* factors, unless those findings were "clearly erroneous."

The Order accurately quotes the Court's statement in *Brock* that the "existence and degree of each factor is a question of fact while the legal conclusion to be drawn from those facts – whether workers are employees or independent contractors – is a question of law." Order at 6. However, the Order ignores the crucial next sentence from the *Brock* decision: "*Thus, a district court's findings as to the underlying factors must be accepted unless clearly erroneous*, while review of the ultimate question of employment status is *de novo*." 840 F.2d at 1059 (emphasis added). In *Zheng v. Liberty Apparel Co.*, 355 F.3d 61 (2d Cir. 2003), the Court reaffirmed, in the summary judgment context, that "findings of historical fact and the findings as to the existence and degree of each factor . . . must be accepted on appeal unless clearly erroneous." *Id.* at 76; *see also Meyer*, 607 F. App'x at 122 n.1, 123 (affirming summary judgment; explaining that district court findings on *Brock* factors must be accepted unless clearly erroneous).

Other Circuits follow the same approach on appeals from summary judgment orders in FLSA cases: reviewing findings of underlying facts and findings as to each factor for "clear error." *See*, *e.g.*, *Martinez-Mendoza v. Champion Int'l Corp.*, 340 F.3d 1200, 1209 (11th Cir. 2003) ("In reviewing the district court's findings of fact with respect to the factors it examines, we give the court the benefit of the clearly erroneous rule."); *Baker v. Flint Eng'g & Constr. Co.*, 137 F.3d 1436, 1441 (10th Cir. 1998) ("In reviewing the district court's decision on appeal, we review the two types of factual findings (findings of historical fact, and findings with respect to the six factors) for clear error."); *Sec'y of Labor v. Lauritzen*, 835 F.2d 1529, 1535 (7th Cir. 1987) ("The underlying facts" and "findings as to the six factors themselves" may be "set aside only if clearly erroneous.").[1]

Accordingly, the Order should have deferred to the District Court's analysis of the underlying facts as well as its determinations regarding the existence and degree of each factor. Here, the District Court examined each of the five *Brock* factors – construing facts and drawing all reasonable inferences therefrom in the light most favorable to Plaintiffs – and found as follows:

- the first factor, the degree of control exercised by the employer over the workers, "weighs in favor of finding that Plaintiffs are independent contractors";
- the second factor, the workers' opportunity for profit or loss and their investment in the business, "weighs substantially in favor of finding Plaintiffs to be independent contractors";
- the third factor, the degree of skill and independent initiative required to perform the work, "does not weigh strongly in either direction";
- the fourth factor, the permanence or duration of the working relationship, "weighs in favor of a determination that Plaintiffs were independent contractors"; and

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[1] This Circuit takes the same approach in reviewing summary judgment orders in similar contexts that also involve a question of law based on a multi-factor factual analysis. For example, in trademark infringement cases, where the "likelihood of confusion" is determined by evaluating the factors set forth in *Polaroid Corp. v. Polarad Electronics Corp.*, 287 F.2d 492 (2d Cir. 1961), "each individual factor is reviewed under a clearly erroneous standard, but the ultimate determination of the likelihood of confusion is a legal issue subject to *de novo* review." *Savin Corp. v. Savin Grp.*, 391 F.3d 439, 457 (2d Cir. 2004).

- the fifth factor, the extent to which the work is an integral part of the employer's business, "weighs in Plaintiffs' favor, but not heavily."

SPA35- SPA38. Based on these findings, and a similar analysis of the factors relevant under New York law, the District Court held that Defendants were entitled to summary judgment on Plaintiffs' FLSA and NYLL claims.[2]

The Order should have deferred to the District Court's findings absent a holding that they were "clearly erroneous" – *i.e.*, that the Court was "left with the definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985). Given the District Court's findings as to the *Brock* factors (and those applicable to the NYLL), the Order should have affirmed the District Court's holding that there was no genuine issue of fact as to the ultimate question of whether Plaintiffs were independent contractors or employees and that entry of summary judgment in favor of Defendants was proper.

II. The Order Erred in Concluding that the District Court Resolved Issues of Fact and that Issues of Material Fact Preclude Summary Judgment.

The District Court's summary judgment order should have been affirmed because there are no genuine issues of material fact that preclude judgment as a matter of law. Contrary to the Order, the District Court did not resolve contested issues of fact, and any disputed facts are not material to the outcome of the suit.

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[2] As the Court explained in *Zheng*: "In order to grant summary judgment for defendants, the District Court would have to conclude that, even where both the historical facts and the relevant factors are interpreted in the light most favorable to plaintiffs, defendants are still entitled to judgment as a matter of law. To reach this conclusion, the Court need not decide that *every* factor weighs against joint employment." 355 F.3d at 76-77 (emphasis in original).

A. The District Court Did Not Resolve Contested Issues of Fact.

The Order identified four examples in which the District Court purportedly resolved disputed issues of fact, *see* Order at 6, but in each of the cited examples, the facts were not contradicted by Plaintiffs' evidence.

First, as to the District Court's statement that Plaintiffs had "ultimate control over their routes," the Order omits the remainder of that sentence, which qualifies the statement and renders it an undisputed fact. The District Court stated: "Plaintiffs have ultimate control over their routes *in the sense that if they do not prefer a particular delivery route, they can bid on a different geographic area as it becomes available*." SPA33 (emphasis added). Plaintiffs did not dispute that fact. Plaintiffs' evidence with respect to bidding was limited to assertions by declarants that they had limited ability to negotiate for higher rates, Appellants' Br. at 10, not that they could not bid for a newly available geographic area.[3]

Second, the District Court did not resolve a factual dispute in stating that "there is a certain amount of control dictated by the type of freight, controlled

[3] Conclusory statements by Plaintiffs' counsel – *e.g.*, that "there was no [bidding] system," Appellants' Br. at 10 – "are not evidence and cannot by themselves create a genuine issue of material fact." *Fletcher v. Atex, Inc.*, 68 F.3d 1451, 1456 (2d Cir. 1995) (internal quotation and citation omitted).

substances, and the resulting Governmental requirements," the resulting constraints are "dictated by the nature of TXX's business" and "many of the requirements are imposed by TXX's Customers, not TXX." Order 6; SPA 33. Nor did the District Court resolve a factual dispute in concluding that "the limited control exercised by TXX is driven by the type of business and freight and the requirements of its Customers." Order 6; SPA 35. Instead, the District Court noted that "Plaintiffs focus on the lack of control regarding the actual delivery," but that they "acknowledge . . . that the route is set forth by the manifest and it is undisputed that the manifests are prepared by TXX's Customers, not TXX itself." SPA33; SPA19 (citing Plaintiffs' declarations). Indeed, Plaintiffs' appellate brief did not contest the *factual* determination that TXX's requirements were dictated by its customers and the nature of its business, instead arguing (incorrectly) that the reason for those requirements is not relevant. *See* Appellants' Br. at 34-35; *Godlewska v. HDA*, 916 F. Supp. 2d 246, 260 (E.D.N.Y. 2013) ("Quality control and compliance-monitoring that stem from the nature of the business – that is, from the nature of the goods or services being delivered – are qualitatively different from control that stems from the nature of the relationship between the employees and the putative employer.") (internal quotations and citation omitted), *aff'd*, 561 F. App'x 108 (2d Cir. 2014) (summary order).[4] The District Court correctly found that "Plaintiffs' remaining arguments concerning Defendants' 'control' over their work are vague, conclusory, and lack evidentiary support." SPA34.[5]

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[4] The cases relied on by Plaintiffs are easily distinguished in that they involved

Third, Plaintiffs' evidence that some of them provided services to TXX "for many years" did not raise a dispute as to the District Court's finding that "[i]n a sense, each bid was essentially a separate job." Order at 7; SPA37. Rather than resolving a disputed issue, the District Court concluded that providing services for extended periods of time does not imply an indefinite relationship, particularly in light of the undisputed fact that Plaintiffs' agreements with TXX were for "short,

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businesses, such as healthcare facilities, that were required by government regulations to closely supervise their workers. *See, e.g.*, *Barfield*, 537 F.3d at 147 (defendant supervised care afforded by temporary nurses to ensure compliance with law); *Brock*, 840 F.2d at 1060 (same); *Gayle v. Harry's Nurses Registry, Inc.*, No. CV-07-4672, 2009 WL 605790, at *7 (E.D.N.Y. Mar. 9, 2009), *aff'd*, 594 F. App'x 714 (2d Cir. 2014) (same). Here, by contrast, the drivers themselves were directly required to comply with certain regulations, such as locks on their vehicles, because they were delivering controlled substances. Furthermore, the District Court correctly concluded that many of the requirements identified by Plaintiffs were imposed by TXX's customers, a critical factor not present in the cases cited by Plaintiffs.

[5] "Genuine issues of fact are not created by conclusory allegations." *Heublein, Inc. v. United States*, 996 F.2d 1455, 1461 (2d Cir. 1993). The Federal Rules require that "[a]n affidavit or declaration used to support or oppose a motion must . . . set out *facts* that would be admissible in evidence." Fed. R. Civ. P. 56(c) (emphasis added). Furthermore, "[i]f a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may . . . consider the fact undisputed for purposes of the motion." Fed. R. Civ. P. 56(e)(2).

renewable terms of 90 days and may be terminated on ten days' notice of the end of each term." SPA37. Other courts have reached the same conclusion on similar records. *See*, *e.g.*, *Browning v. Ceva Freight, LLC*, 885 F. Supp. 2d 590, 609-10 (E.D.N.Y. 2012) (holding that plaintiff delivery drivers, some of whom had worked with defendants for five to ten years, were independent contractors in part because their contracts were for successive one-year terms and could be terminated by either party on thirty days' notice).

B. The District Court Correctly Found the Parties' Factual Disputes Were Immaterial or Illusory.

The Order incorrectly states that there are "issues of material fact" that preclude summary judgment and as to which the parties submitted conflicting evidence. Order at 7-8. The purported disputes identified in the Order are immaterial, illusory or both.

The first and second purported issues of fact, relating to vehicle specifications and whether drivers were reprimanded for taking breaks, would not affect the outcome of the "control" factor, much less the ultimate question of employment status. "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis in original). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id.* at 248.

With respect to vehicle specifications, the District Court found that, even accepting Plaintiffs' assertion that TXX required them to use a van of a "certain size" and weighing less than 10,000 pounds (in order to use passenger routes),[6] the undisputed facts regarding control over vehicles strongly support a finding that Plaintiffs were independent contractors:

- "The Drivers own their own vehicles, TXX imposes no restrictions on the use of the vehicles, and Plaintiffs acknowledge that they drive them for personal use."
- "Plaintiffs do not claim that they are required to affix any TXX signage to their vehicles, and indeed, the Non-Party Drivers state that their vehicles do not bear TXX signs."
- "[T]here is no prohibition on Drivers providing services to other businesses in addition to TXX."
- "Drivers are allowed to hire other Drivers or helpers to work for their business entities without TXX's permission or approval . . . ."

SPA22, SPA23, SPA36.[7] Moreover, as noted above, the District Court found that the "limited control exercised by TXX" was "driven by the type of business and freight and the requirements of its Customers." SPA35. Thus, resolving any factual dispute regarding vehicle type and weight in favor of Plaintiffs, the District Court correctly concluded that the "control" factor weighs in favor of a finding that Plaintiffs were independent contractors. SPA28, SPA35.

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[6] The District Court noted that TXX claimed that drivers used a variety of vehicle types, and a non-party driver corporation stated that it used both vans and cars. SPA22.

[7] Other courts have similarly recognized these facts as touchstones of control in this context. *See Ruiz v. Affinity Logistics Corp.*, 754 F.3d 1093, 1097 (9th Cir. 2014) (finding control where drivers were "encouraged, if not required," to

The same analysis applies to the assertion by one Plaintiff that he was "reprimanded" for taking a break. SPA19. Even crediting that assertion, to the extent that TXX may have contacted him after Customers or Retailers asked about the status of their deliveries, SPA20, that contact was necessitated by the needs of TXX's Customers and is not sufficient – particularly in light of the numerous undisputed facts demonstrating that Plaintiffs had considerable control over their routes and deliveries, SPA17- SPA20 – to raise a genuine issue of material fact as to employment status. *See*, *e.g.*, *Meyer v. U.S. Tennis Ass'n*, No. 11 Civ. 6268, 2014 WL 4495185, at *7 (S.D.N.Y. Sept. 11, 2014) (holding on summary judgment that plaintiffs, tennis referees, were independent contractors even though defendant had "some degree of control over Plaintiffs (uniforms, best practices, evaluations, and code of conduct)"), *aff'd*, 607 F. App'x 121 (2d Cir. 2015).

As to the third purported issue, whether TXX required drivers to work a minimum number of hours, the evidence cited in the Order demonstrates the lack

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lease branded trucks from the defendant and to comply with various uniform and grooming requirements).

of a genuine dispute: on the one hand, the contracts at issue "expressly specify" that drivers are not subject to such requirements, while on the other hand, one Plaintiff declared that there were "times when TXX called me . . . to perform more work," and "[w]hen they called I was required to do as they directed." Order at 8 & nn. 5-6; A416. Even crediting that vague and conclusory assertion, it does not suggest that TXX imposed a minimum-hours requirement. It therefore was entirely proper for the District Court to find that this was an undisputed fact.

The fourth and fifth "issues of material fact" identified in the Order are not actually disputed factual issues. Whether Plaintiffs "were economically dependent on TXX" is a recitation of the ultimate question of law in this case: Plaintiffs' employment status under the "economic reality test." Order at 7; *see Brock*, 840 F.2d at 1059 ("The ultimate concern is whether, as a matter of economic reality, the workers depend upon someone else's business for the opportunity to render service or are in business for themselves."). Similarly, whether "TXX controlled plaintiffs and, if so, to what extent" is one of the *Brock* factors (and a factor under the NYLL), not an underlying factual issue. In virtually every litigation, the parties disagree on the *Brock* factors and the ultimate legal question of employment status, but those disagreements do not preclude summary judgment.

III. The Order Did Not Separately Address Defendant Patricia Hunt.

The District Court granted summary judgment to both Defendants, TXX and Ms. Hunt. On appeal, Plaintiffs-Appellants attempted to marshal evidence establishing error as to TXX, but offered no evidence demonstrating any involvement or liability on the part of Ms. Hunt. There was absolutely no basis in the record or the briefs to reverse as to Ms. Hunt. Although Defendants raised this point before the District Court and in their appellate brief, the Order did not address it. Defts.' Resp. to Objections at 6; Appellees' Br. at 21; Order at 6-8. The Order erred in reversing the District Court's summary judgment order as to Ms. Hunt.

CONCLUSION

For the foregoing reasons, Defendants-Appellees respectfully request panel rehearing. The judgment of the District Court granting summary judgment should be affirmed.

Dated: November 8, 2016

Respectfully submitted,

By: /s/ Edwin G. Schallert

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ANNEX

15-3424-cv
Thomas v. TXX Servs., Inc.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 25th day of October, two thousand sixteen.

PRESENT: DENNY CHIN,
SUSAN L. CARNEY,
Circuit Judges,
BRIAN M. COGAN,
District Judge.*

- -x

CECIL THOMAS, individually and on behalf of all others similarly situated, JOHN DEAN, individually and on behalf of all others similarly situated,
Plaintiffs-Appellants,

MUHAMMAD ASIF, NARESH BOORANI, MARK BOURNE, EDGAR CAMPOS, JOSE H. CANCELA, CUSH RACK CUNNINGHAM, SOLOMON DESNOES, OSCAR F. GONZALEZ, JAMES CORNELIUS GRANT, DONALD HENDRICKS, CARL HENRY, KORHAN KIZIL, DERELL LEWIS, WINSTON LINDSAY, ROSA MARIN, GONZALO

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* Judge Brian M. Cogan, United States District Court for the Eastern District of New York, sitting by designation.

V. MORALES, ANITA MOROCHO, PATRICIA E. MUNOZ, VICTOR A. OGUNBEDEDE, ALMA D. POPOCOL, ANDREW THOMPSON, IAN GEORGE THOMPSON, IREAL B. WADADA, COURTNEY SMITH, NICHOLAS BARATTA, IBRAHIM TAKANE, MARLON OLIVEIRA, MANUEL A. MIRANDA, BRANNE GONZALEZ, HAMILTON VASCO, WUILINTON MEJIA, DIOGENES A. GARCIA, AUDRE MAURICE HOLMES, HECTOR RODOLFO MARTINE ANDRADE, LAMONTE DAVID DEFRECCE, JOSEPH MORRIS, RUPPERTO PIZZO, TERENCE TOMLIN, LIONEL SMITH, LUIS D. FLORES, ISIDORO D. DIZON, JR., ERNST DENIZARD, OSCAR RODRIGUEZ, GERMAN A. MORAN RIOS, TEJDHARI RAGHUBIR, THOMAS J. GARGER, BORIS BABAEW, ADRIANA ORTELLADO, DENIZHAN OZTURK, ALEJANDRO SOLIS, HECTOR R. MARTINEZ, JOSE E. PICO, JOSE PLUTARCO PICO-ALVIA, DAISY E. ALVANADO, KARL DONOVAN BUCKLE, WON S. HAN, ABRAHIEM MOHAMAD, DEXTER C. ALEXANDER, LESTER ALEXANDER, LUIS XAVIER VILLALVA, ROBERT PERDUE, HARPAL SAWHNEY, EDUARDO FERNANDEZ, STEPHEN ANTHONY JOHN, MUHAMMAD ASHIQ, KONSTANTINOS VASILIOU, RICHARD S. ARMSTRONG, TYRONE DAVIS, ELWOOD CHAPMAN, OLIVER JACQUES SIMON, DEGOU GEORGE PAUL, HECTOR R. MARTINEZ,

Plaintiffs,

v. 15-3424-cv

TXX SERVICES, INC., PATRICIA DOUGAN HUNT,

Defendants-Appellees.[**]

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[**] The Clerk of Court is directed to amend the caption to conform with the above.

FOR PLAINTIFFS-APPELLANTS:	DENISE A. SCHULMAN, D. Maimon Kirschenbaum, Joseph & Kirschenbaum LLP, New York, New York.
FOR DEFENDANTS-APPELLEES:	JEFFREY W. PAGANO, Ira M. Saxe, Crowell & Moring LLP, New York, New York.

Appeal from the United States District Court for the Eastern District of New York (Feuerstein, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **VACATED**, and the case is **REMANDED** for further proceedings consistent with this order.

Plaintiffs-appellants appeal the district court's judgment entered October 14, 2015 awarding summary judgment to defendants-appellees TXX Services, Inc. ("TXX") and Patricia Dougan Hunt pursuant to Federal Rule of Civil Procedure 56 and dismissing plaintiffs' claims. By order entered September 30, 2015, the district court accepted the report and recommendation of the magistrate judge (Locke, *M.J.*) recommending that the court grant summary judgment in favor of defendants, on the grounds that plaintiffs were independent contractors and not employees under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201 *et seq.*, and the New York Labor Law ("NYLL"), N.Y. Lab. Law §§ 190 *et seq.* We assume the parties' familiarity with the underlying facts, procedural history, and issues on appeal.

TXX is a transportation company that delivers freight for customers by receiving freight at its facility and engaging drivers to deliver the freight to retailers.

Hunt is an owner and shareholder of TXX. Plaintiffs are former and current delivery drivers who, through business entities, entered into contracts with TXX to deliver freight for TXX customers. They allege that defendants violated the FLSA by withholding overtime wages and violated the NYLL by reducing their wages, failing to pay wages in a timely manner, withholding overtime wages, and failing to comply with notice requirements.

In November 2013, defendants filed a motion for judgment on the pleadings that relied on affidavits. The district court referred the matter to the magistrate judge (Wall, *M.J.*), who recommended that the motion not be converted to a motion for summary judgment, that the parties be permitted to conduct additional and limited discovery, and that the motion, which he treated as a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), be denied. The district court decided to convert defendants' motion for judgment on the pleadings into a motion for summary judgment, set a deadline for supplemental submissions, and allow plaintiffs to take a deposition under Federal Rule of Civil Procedure 30(b)(6), but no other depositions.

In September 2014, defendants filed a motion for summary judgment which the district court referred to another magistrate judge (Locke, *M.J.*). On May 22, 2015, the magistrate judge filed a report and recommendation that (1) applied the multi-factor tests set forth in *Brock v. Superior Care, Inc.*, 840 F.2d 1054 (2d Cir. 1988), and *Deboissiere v. Am. Modification Agency*, No. 09-CV-2316 (JS)(MLO), 2010 WL 4340642

(E.D.N.Y. Oct. 22, 2010), (2) concluded that plaintiffs were independent contractors and not employees under the FLSA and NYLL, and (3) recommended that the district court grant summary judgment in favor of defendants.

On September 30, 2015, the district court accepted and adopted the magistrate judge's report and recommendation, over plaintiffs' objections, and granted defendants' motion for summary judgment. The district court then dismissed plaintiffs' claims on October 14, 2015. Plaintiffs appeal that award of summary judgment as improper because they claim the district court resolved factual disputes in defendants' favor, failed to credit plaintiffs' evidence and draw reasonable inferences in their favor, and erred in holding that plaintiffs were not employees under the FLSA and NYLL.

We review an award of summary judgment *de novo* and will affirm only if the record, viewed in favor of the party against whom judgment was entered, shows that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. *Barfield v. N.Y.C. Health and Hosps. Corp.*, 537 F.3d 132, 140 (2d Cir. 2008).

The inquiry into employee status under the FLSA concerns whether, based on the totality of circumstances and "as a matter of economic reality, the workers depend upon someone else's business for the opportunity to render service or are in business for themselves." *Brock*, 840 F.2d at 1059. Under the fact-intensive "economic reality" test, courts consider

> (1) the degree of control exercised by the employer over the workers, (2) the workers' opportunity for profit or loss and their investment in the business, (3) the degree of skill and independent initiative required to perform the work, (4) the permanence or duration of the working relationship, and (5) the extent to which the work is an integral part of the employer's business.

Id. at 1058-59. The "existence and degree of each factor is a question of fact while the legal conclusion to be drawn from those facts -- whether workers are employees or independent contractors -- is a question of law." *Id.* at 1059.

A determination of whether a worker qualifies as an employee under the NYLL depends upon factors such as whether he or she "(1) worked at his [or her] own convenience, (2) was free to engage in other employment, (3) received fringe benefits, (4) was on the employer's payroll, and (5) was on a fixed schedule." *Deboissiere*, 2010 WL 4340642, at *3 (citing *Bynog v. Cipriani Grp., Inc.*, 1 N.Y.3d 193, 198 (2003), and *Velu v. Velocity Exp., Inc.*, 666 F. Supp. 2d 300, 307-08 (E.D.N.Y. 2009)). The analysis focuses on "the degree of control exercised by the purported employer over the results produced or the means used to achieve the results." *Bynog*, 1 N.Y.3d at 198.

We conclude the district court erred in granting summary judgment to defendants. First, instead of determining whether issues of fact existed for trial, the district court resolved the issues of fact itself. For example, the district court (1) found that plaintiffs have "ultimate control over their routes," (2) concluded that TXX exercised only "limited control" over drivers, (3) concluded that many of TXX's requirements for the drivers were "dictated" by the nature of its business or imposed by customers, rather than by TXX itself, and (4) found that "each bid was essentially a separate job," even though some plaintiffs had provided services to TXX "for many years." S. App. at 33, 35, 37, 39.

Second, the record demonstrates that there are issues of material fact that preclude summary judgment. The parties, for example, disputed whether (1) TXX required drivers to drive delivery vehicles conforming to TXX specifications; (2) drivers could take breaks on their delivery routes without facing disciplinary action by TXX; (3) TXX required drivers to work a minimum number of hours; (4) plaintiffs were economically dependent on TXX; and (5) TXX controlled plaintiffs and, if so, to what extent.

Third, plaintiffs did not rely simply on conclusory assertions in opposing summary judgment, but submitted sufficiently detailed affidavits. Indeed, the parties submitted conflicting evidence. Defendants provided declarations signed by non-party drivers stating that they used vehicles of their own choosing and that they did not follow TXX rules.[1] Plaintiffs, in turn, proffered their own signed declarations asserting that TXX required them to use vans over a particular size and under a particular weight and to ensure that the vans had tinted windows.[2] Defendants presented declarations suggesting that drivers had full discretion to take their own breaks and make personal stops.[3] Plaintiffs provided the signed declaration of another driver declaring that, when he tried to take breaks or deviate from his route, he received calls from TXX reprimanding him and instructing him to return to his deliveries.[4] Plaintiffs offered a signed declaration from a driver claiming that he sometimes received calls from TXX in the afternoon and on weekends directing him to complete more deliveries.[5] Defendants, on the other hand, provided copies of their contracts with the drivers which expressly specify that drivers can reject assignments for any reason and are not required to work a certain number of hours.[6] Plaintiffs claimed that "they worked exclusively for TXX" and "could not share work with others without TXX's approval," Appellants' Reply Br. at 8 (citing App. at 384, 387, 403, 406, 414, 423), while defendants' contracts with the drivers explicitly state that drivers can perform services for other companies and hire assistants or helpers to complete deliveries.[7]

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[1] *See, e.g.*, App. at 65 (driver declaration asserting that he delivered freight "in secure vehicles of the choosing of [the drivers' business entities]").

[2] *See, e.g.*, *id.* at 393 (driver declaration claiming that "TXX requires vehicles that weigh less than 10,000lbs in order to use passenger routes, as opposed to commercial routes"); *id.* at 403, 409 (driver declaration stating that "TXX requires I use a van of a certain size for

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deliveries" and "TXX requires that I tint the windows on my van in order to continue performing work for them").

[3] *See, e.g., id.* at 73 (driver declaration averring that he and other drivers "at all times have decided[] . . .whether or not to take any stops for personal reasons, the nature of those stops and the duration of those stops").

[4] *Id.* at 416 (driver declaration asserting that "[w]hen I deviated from my route, I would receive a call from TXX reprimand[ing] me and instructing me to get back to delivery").

[5] *Id.* (driver declaration stating that there were "times when TXX called me in the afternoon and on Saturdays to perform more work" and that his compliance was required).

[6] *See, e.g., id.* at 378 (contract providing that an "Owner-Operator may accept or reject any opportunities offered by TXX, without any reason" and "is NOT required to perform services for a minimum or maximum number of hours per day or per week").

[7] *See, e.g., id.* at 378, 379 (contract stating that an "Owner-Operator is encouraged to and is free to offer his services to others and perform services for more than one company at a

On this record, the district court's award of summary judgment on the issue of plaintiffs' status as employees under the FLSA and NYLL was unwarranted. *See Velez v. Sanchez*, 693 F.3d 308, 325-31 (2d Cir. 1984) (vacating an award of summary judgment in an FLSA case in part because there were genuine issues of material facts as to whether plaintiff was an "employee" within the meaning of the FLSA); *see also Graziadio v. Culinary Inst. of Am.*, 817 F.3d 415, 422-24 (2d Cir 2016) (vacating an award of summary judgment in an action brought under the Family and Medical Leave Act (FMLA) in part because there were factual disputes as to whether the FMLA's definition of "employer," which tracks the FLSA's definition of "employer," covered the defendant).

Accordingly, we **VACATE** the judgment of the district court and **REMAND** the matter for further proceedings consistent with this order.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

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time" and "is not required to provide services personally and may hire assistants or helpers to complete the work"); *id.* at 384, 387 (driver declaration asserting that "I was not allowed to share stops or routes with other drivers without the approval of TXX" and "TXX prohibited me from having contracts with any of TXX's customers for whom I made deliveries").